Environmental Measures and Alien Owners

by RUDOLF DOLZER*

Environmental problems are often caused by use and disposal of movable and immovable property. In many cases, technological development and inventions have empowered owners to endanger the environment. In other instances, traditional ways of dealing with property present negative environmental consequences under modern conditions. The cause of adverse environmental impact seems mostly ignored by legislatures. It often appears more convenient for them to refrain from addressing underlying technological developments or other indirect causes and simply look to the last link of the chain, that is, prohibiting the respective owner from making such use of his property as is now considered environmentally harmful. Thus, an increasing body of environmental legislation in various countries contains provisions which limit the traditional sphere of owners' rights.

1. The doctrine of ownership, being an absolute carrying unlimited rights according to legal theories of the 19th century raises the question of whether or not property use limiting measures entitle the owner to compensation for those rights previously enjoyed but later lost due to new legislation. Of course the legislative power in a given country can decide to grant or withhold such compensation. Politically the decision will be influenced by financial considerations, by the rank of environmental strategies on the priority list of the legislature, and by the political power of the interest group presenting the proposed legislation. Legally, the compensation issue will be largely determined by the doctrinal influence on the notion of property[1]. The more emphasis is put on the notion of property as an unlimited right allowing no accomodation for and integration of changing social needs, the stronger will be the owner's case for compensation. Conversely, when a constitution recognizes a social obligation of individual owners, it will become difficult to prove the owner's right to compensation.

Of course, not only citizens of a country are affected by such legislation but also foreign investors. International law does provide rules protecting foreigners' life, freedom and property. According to traditional doctrine, the legal status of the citizen and the alien are not in all respects identical. The ties between the national and his or her country are closer than those of the alien and the host state. On the one hand, this means less rights for foreigners than citizens in such areas as voting and social benefits; on the other hand, the alien's position entails less obligations for instance in military service. The different status of citizens and aliens under both domestic and international law raises the following questions: Will a host country granting no compensation for environmental measures limiting property rights to its own citizen be required by international law to make payments to affected aliens who hold property within the territory of the state?

2. The only known case on this issue is the Exploma case, arbitrated in 1972 before an American tribunal in Washington[2]. The question was whether certain conservation measures carried out by the Dominican Republic amounted to an "expropriatory action". The case was argued before an American tribunal because a Dominican corporation (Exploma) affected by these conservation measures was owned by an American corporation, International Bank. The International Bank had previously insured itself, under a US Government program, against "expropriatory actions". Since the agency administering the insurance program, the Overseas Investment Program Corporation (OPIC), had denied that the International Bank had acquired a claim to be compensated for the effects of the conservation measures on its business, the Bank brought the case before the arbitration tribunal established for disputes in the Contract of Guaranty.

The environmental measures in question were designed by the Dominican Republic for forestry and watershed protection. The claimant did not argue that the conservation program was unsound from an environmental point of view or that it was primarily used as pretext for forcing measures onto foreign interests. The only basis upon which the claimant rested his case was that the environmental program interfered with the lumber business which Exploma had carried on in the Dominican Republic since 1965. Between 1966 and 1967, the host country had first prohibited the export of the type of timber cut by Exploma, and then ordered the closing of all sawmills in the state. After the measures were publicized, Exploma successfully asked the host governement to be exempted from both. As a result, Exploma ran the only sawmill in the Dominican Republic and was the only exporter of its product since 1967. In accordance with Dominican law, Exploma operated from the beginning on the basis of a series of cutting permits. When it asked, as a routine measure, for a renewal of the cutting permits in 1968, the permits were initially denied, but four months later granted. In spring 1969, the Dominican Government assured Exploma that future permits would be granted "without problems". Nevertheless a decree issued in summer 1969 stated that "no permit shall be authorized for cutting of timber unless in exceptional cases and with the prior approval of the Chief Executive". Exploma had stopped its operations after the initial denial of cutting permits in 1968, and never resumed them.

Relying on these facts, the International Bank argued the Exploma had in effect been subject to an "expropriatory action" in the meaning of the Contract of Guaranty and therefore had a right to

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compensation. The legal basis for the decision was not international law, but rather the terms laid down in the Contract of Guaranty between claimant and OPIC. The General Terms and Conditions of the Contract provided that no claim was to arise (a) if the measure in question was not by its express terms for the purpose of expropriation, (b) was reasonably related to constitutionally sanctioned governmental objectives, (c) was not arbitrary, (d) was based upon reasonable classifications of entities, and (e) did not violate generally accepted principles of international law. The arbitrators in this case carefully observed these legal conditions and pointed out in their opinion that the series of blanket conservation measures as such were no doubt reasonable. The major part of the opinion noted that the various measures of the host government before its final 1969 decision did not have the effects of preventing Exploma from "exercising effective control over the use of disposition of substantial portions of its property... for a period of one year or more", and therefore did not require compensation under the express terms of the Contract. Much less attention was paid to the more basic question of whether or not the substantive measures as such amounted to an "expropriatory action". It appears that the arbitrators had no doubt that this was not the case. Indeed, one must agree that the decision was clearly dictated by the terms of the Contract of Guaranty, and that no other result would have been legally sound.

In assessing the opinion for its contribution to international law, it must be kept in mind, however, that the Rules of the Contract of Guaranty were not entirely identical to those of strict customary international law. What significance, then, must be attributed to the statement in the opinion that the conservation measures did not violate generally accepted principles of international law? It will no doubt be observed in this context that the arbitrators devoted no more attention than a brief footnote to this broader issue; there, they stated simply without further explanation, that the measures did not require compensation under the norms of international law according to the American Law Institute. Of course, such a peripheral treatment immediately calls for a very cautious assessment of this part of the opinion.

3. A court faced today with the broad question of the alien's right to compensation for property-restricting environmental measures would be dealing with one of the most difficult and sensitive issues of contemporary international legal order. That court would first have to define the general rule of international law regarding the protection of alien property; this issue has often been dealt with in past decades, but is now even more complex and controversial than before. Reaching a decision on this general issue, the court would then have to determine the legal principles which characterize a taking under modern international law. Finally, the court would have to apply these legal rules to modern environmental measures. Any attempt to establish and to justify satisfactory solutions to such basic questions requires a comprehensive legal analysis of the fundamental aspects of contemporary international law.

The author of this article limits his analysis to a few basic suggestions indicating the problems involved and suggesting a general direction for finding a solution.

The traditional rule of international law which is today so controversial was usually captured in the formula of "full, prompt and effective" compensation for expropriated foreign property. "Full" stood for market value and "effective" meant that the currency used for payment had to be convertible into one of the major currencies of the world market. The wording was first used by American Secretary of State Hull during a dispute with Mexico about the nationalization of the oil industry in 1938[3], and it is referred to in this article as the "Hull rule".

The norm had its origin in the domestic legal orders of Western states in the 19th century. Within all the states that shaped the rules of international law during that era, the dominant liberal notions of the state and society were reflected in the high consideration given to private property. Thus, it was only natural for these states to apply the same principle in their international relations. It is therefore incorrect to say that the Hull rule was designed by capital-exporting countries to protect their specific interests; the Hull rule dates from a period in which is was applied by Western states against Western states. However the number of states with a liberal domestic order gradually declined and today even Western states have partially given up classical liberal principles in the area of property law.

The first major challenge to the Hull rule was presented by the Soviet Union after 1917, and Rumania and Mexico followed suit in major controversies during the next two decades. From different perspectives, these states argued in essence that the sovereignty of the host state conferred the power to regulate all legal questions arising within their territory independent from any rules of international law, and that the alien owner had no reason to ask for better treatment than citizen owners of the host country. After World War II, the practice of the Eastern countries did not fully correspond to their theoretical position; in some cases, even the Soviet Union deviated from the rule for which it had formerly so forcefully argued. Under these circumstances, there was a strong argument that the Hull rule represented international law, at least in principle.

However this trend on the international scene soon changed. An increasing number of the newly created capital importing countries repudiated the old Hull rule having not participated in its formation and rejecting its alleged one-sided emphasis on the interests of the capital exporting countries. For a number of years it was not entirely evident how many countries agreed with which position; the legal status of the Hull rule had become ambiguous again, but it was still possible to make a case for it in the light of the conventional rules on the sources of international law.

At the beginning of the 1970's it became evident that the Hull rule was supported by only few countries outside the Western industrialized sphere. Finally, an open clash on the diplomatic level could no longer be avoided. When the Third World attempted to establish a comprehensive new legal framework for the international economic system, it was certain that the issue of expropriation would be one of the major items on their agenda. Western nations tried to persuade representatives of the Third World not to push through a one-sided perspective with their strong majority in the UN General Assembly. Nevertheless, no consensus was reached, and a vote was taken on the final document, the Charter of Economic Rights and Duties[4], in 1974. 120 countries voted for the acceptance of the draft, six opposed it, and 10 countries abstained. Article 2 of the Charter provides that where aliens' property is expropriated the compensation issue must be decided in the framework of the applicable national order.

This clause had been the subject of long discussions during the preparation of the draft and undoubtedly its wording implies that, in the opinion of its authors, international law has no bearing upon questions of expropriation of aliens' property. Of course one has to consider the legal significance of the vote It is widely accepted that resolutions passed by the General Assembly do not by themselves create "instant customary international law" insasmuch as they address problems which have long existed[5]. But such resolutions have legal effects in a less direct manner. First, they establish the platform for future discussions on the development of international law. Second, (this effect has so far been mostly overlooked by commentators of international law) such resolutions are relevant insofar as the *opinio iuris* of the member states of the world community forms part of the process by which customary law comes into existence, changes, and disappears. Frequently, it is practically impossible to find out the prevalent legal positions of many of the member states on controversial issues. For understandable reasons the foreign offices hesitate to state their legal position unless external circumstances force them to do so. Votes in the General Assembly do away, at least in part, with this practical dilemma. This is true even though over the years the lack of a binding effect of the vote sometimes influenced some countries in some cases to cast their vote in a manner less dictated by legal considerations than by political expediency.

According to generally accepted doctrine, the *opinio iuris* is an essential factor for the creation of customary international law both in the practice of states and the general principles of international law[6]. Without elaborating specifically on all the doctrinal facets involved, it is sufficient to say here that no rule of customary international law can develop or continue to exist while opposed by a large majority of states. In essence, this result is required by the strongly consensual element of the international lawmaking process. Given the fact that 106 states voted for the Charter of Economic Rights and Duties, it is extremely difficult to argue consistently that the Hull rule reflects contemporary international law. In general, the Western commentators have so far failed to recognize this implication of the majority vote for the Charter[7].

But these reflections do not imply that the "domestic equal treatment standard" as favored by the countries voting for the Charter has now automatically received the status of international law. It must not be overlooked that this notion has so far not been reflected in the actual conduct of states. The dynamics of customary international law is determined by actual practice at least as much as by the legal convictions; both elements enter into the process by which norms develop. The capital exporting countries will in the future hardly accept the rule proposed in the Charter. Their voice cannot unilaterally determine the state of the law; but as the group mostly affected by the rules on alien property, they have a legitimate claim to co-determine the further development of the law. With good reasons, these countries will certainly insist in the future that the limited rights of aliens must be accompanied by a limitation of their obligations; in this respect, the equal protection standard itself calls for a privileged position of alien owners.

4. Any court having to present a decision on the present status of international law would, under these circumstances, have to recognize the peculiar doctrinal features of an almost unique legal situation. The court would have to face that the divergence between previous practice and the contemporary legal conviction of a large group of states is further complicated by the particular nature of the disparity between the two substantive positions in dispute between the two groups. An application of the traditional principle of the presumption of freedom for the states in the absence of a clear, uniform international practice and corresponding legal conviction would in effect, under such conditions, simply favor the new majority, a result which has been rejected above in the light of the strong role of practice and interest-balancing in international law. In other words, the present situation is characterized by conditions under which the conventional rules on the sources of international law are inconclusive. In such an exceptional legal setting, a court would consequently be barred from accepting either one of the two rules in dispute, and it would not be guided in its search for the applicable law by traditional notions on the sources of law. The only escape from such a dilemma can methodologically be seen in an approach which identifies the various interests involved, and compromises them in a manner which is oriented at the prevalent needs of the larger international community[8]. A court would have to be courageous enough to spell out a policy which takes both positions into account, adopts neither, and in effect establishes a third solution.

What would be the characteristics of a policy solution which would take into account the outlined major positions held by states today? From an international economic viewpoint, it is now established that no general statement can be made on the value of foreign investment as such . It is economically neither true that foreign investment helps a country in each situation, nor that it is harmful under all circumstances[9]. From a political perspective, the same reasoning applies in principle. Only specific ideological premises can lead to the conclusion that a strictly liberal investment policy is in the best interest of each host state, or that the dependence on foreign interests accompanied by foreign investment makes it undesirable for each state to have foreigners participate in its economic process. In a world divided into ideological blocs, universally accepted international law cannot favor any one of the disputed political or economic systems. But once the extreme economic and political arguments are rejected, it still remains true from an international viewpoint that certain types of foreign investment are more conductive to the development of a country than others. The work done by the World Bank, for instance, indicates that it is not meaningless or impossible to speak, in economic terms, of certain developmental objectives and their implementation as feasible, desirable or impossible. Of course, such evaluations are in themselves related to certain value judgments, in particular to a positive evaluation of economic development as such. But now that many conventions and treaties have emphasized the high priority of development for the world community and that, at least on an abstract level no major state would be opposed to the economic development of other countries it is logical to accept the value of economic development as one of the international community[10].

It is therefore reasonable in international law to favor conditions likely to make positive contributions to the development task. Such a premise does not yet give a policy oriented answer to the issue of compensation but allows further conclusions. The compensation rule must consider wheth-

er the nationalized object has contributed to the developmental needs of the country, or whether it has prevented its economic progress, while reflecting that the investor entered the country with explicit or implied consent.

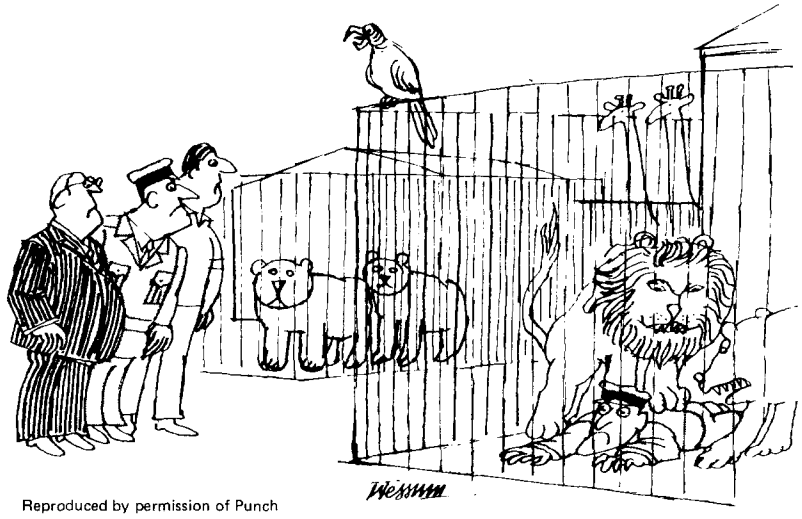
In principle, it must therefore be assumed that, at the time of the initial investment, the government saw no potential harm. The problematic questions arise in fact when a subsequent government reaches an opposite conclusion. In such a situation, a policy-oriented approach will not *a priori* support the judgment of either governments, but require a development-oriented economic analysis of the given facts. This means that the expectations which the foreign investor had placed in the judgment of the preceding government will no longer be protected under all circumstances. The crucial question will then be whether the investing company has made its decision in accordance with the developmental needs of the host country. For the examination of this question it will be appropriate to give the "benefit of doubt" to the foreign investor who cannot be reasonably expected to search for an independent and detailed judgment concerning these needs. Regarding interest-balancing policy considerations such an approach is, at least partially, responsive to the often repeated claim of capital importing countries that their economies have been unreasonably exploited by foreign investors and that the old rules on expropriation therefore ought to be abandonned. On the other hand, the foreign company must not be left without international legal protection after it has carefully analyzed the economic situation of the potential host country before its initial investment decision and has consequently decided that its planned project is not in collision with the future interest of the host country.

Of course, these basic considerations are too closely related to throw any light on all practical aspects. A comprehensive view would introduce further distinguishing elements such as the respective importance of the property type in question. The disposition over its natural resources may well be of central political importance for a country, whereas personal property will seldom have any basic impact on the further course of the host society. In between lies business and real property. The life span of the expropriated objects and the amount of gains made in the past have to be considered also. Certainly it would seem appropriate to award less compensation for projects which have yielded high gains over a long period than for those made recently which have yielded no gains yet. A policy approach would also need to determine whether the foreign investment in the host country has limited political freedom to an unusual degree.

From a broader point of view, the introduction of policy considerations will draw the foreign investor closer to the general legal economic process of the host country than the old Hull rule. Foreign status requires a principally different treatment and the foreign company will retain a privileged position.

The policy approach suggested here is the following: the foreign investor would have to share with the citizens all those legal developments foreseeable at the time of the investment decision (or a considerable time before the implementation of the measure), whereas the case for the protection of foreign property by international law would be much stronger under circumstances which were not predictable. Predictability, however, is to be judged from an economic viewpoint rather than from a political one. A policy-oriented approach leads us to put more emphasis on the economic ties of the foreign investor with his host country than on the sharing of its political course since the foreigner does not participate in the political process. Moreover, the foreigner has not only less input, but also less insight into political trends of the host country. Most important, the case of international law for economic development has no counterpart on the political level; the international community as a whole has no interest in the domestic political development of a nation. With these observations in mind, this policy approach will be referred to, in this article, as the "concept of legitimate reliance".

5. How does such an approach affect the treatment of foreign property in cases of its limitations through environmental measures? The large spectrum of actions taken by a state as being environmentally motivated prevent the finding of one general answer. The concept of legitimate reliance as suggested above requires a careful examination of all relevant facts, in environmental and all other areas; its policy-oriented nature and emphasis on results responsive to contemporary needs of the world community implies more than the simplicity of the Hull formula.



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"We want free cattle transport to the wilderness, and fodder for the first ten days."

The concept of legitimate reliance will be applied here not to the full environmental spectrum, but only to one specific hypothetical case pointing mainly to the solution of practical issues needed. Assuming that a foreign corporation C decides to build a plant in a developing country D. C's investment decision is strongly influenced by the fact that D has not so far enacted any standards for clean air and clean water; these low environmental requirements reduce the production costs which C would have to face in other environmentally oriented countries. After three years in operation, a new government in D comes to power and soon enacts higher standards for clean air and water. Economically the impact of the new measures makes continued opera-

tions by C unattractive. Should C claim compensation for the rights lost because of the new statutes? Is the concept of legitimate reliance applicable? The frustrated expectations of C were based on its evaluation that D's environmental standards would always remain the same. Was it rational for a business executive to rely entirely on the environmental underdevelopment of D? From the viewpoint of the world community interests, is there a need to honor such a form of reliance? No extensive explanation is needed to justify a negative answer. Within the last decade the knowledge gained and the trends observed easily demonstrate the rise of environmental sensitivity in many countries. Moreover, statements made on the international level emphasize the need for reasonable environmental measures which are clearly in conformity with the broader interests of the community. In such a setting, the virtue of a concept of legitimate reliance becomes evident: It must be, in principle, responsive to the needs of the host state and to the broader community without at the same time giving up that degree of protection for the foreign investor which appears desirable and legitimate from the community perspective.

1 For a modern discussion of the problems arising under US law, see B. Ackerman, Private Property and the Constitution (1977). The Constitution of the Federal Republic explicitly refers to the social aspects of property rights; see R. Dolzer, Property and the Environment: The Social Obligation Inherent in Ownership (1976).
2 The opinion in this arbitration is reprinted in 11 International Legal Materials 1216 (1972) (opinion dated November 8, 1972)
3 See US Department of State, 19 Press Releases 50, 136, 139, 165 (1938).
4 A/RES/3281 (XXIX), UNMC 1975, Nr. 1, 108; a careful and well-balanced evaluation of the Charter's legal substance and effect is found in C. Tomuschat, Die Charta der wirtschaftlichen Rechte und Pflichten der Staaten, 36 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) 444 (1976).
5 See I. Seidl-Hohenveldern, *Völkerrecht* 100 (ed, 3, 1975), with further references.
6 *Id.* at 97.
7 In this respect, the analysis of C. Tomuschat, supra note 4, does not adequately reflect the impact of the Charter.
8 Such a rule-finding technique is responsive to the demand for a general interpretative method regarding the needs of the international community and consequently rejecting an exclusively sovereignty-oriented approach. See R. Bernhardt, *Ungeschriebenes Völkerrecht*, 36 ZaöRV 51, 58 (1976). It is, however, only peripherally overlapping with the major arguments advanced by Myres McDougal for his version of a policy approach. A careful analysis of the decision rendered by the International Court of Justice (ICJ) in the Fisheries Case (United Kingdom v. Norway), (1951) I.C. J. Rep. 116, for instance, indicates that a policy-oriented approach is, under limited conditions, no longer acceptable.
9 *Ibid.*
10 C. Kindleberger, *International Economics* (ed. 5, 1973), at 245 - 283.

The discussion of this hypothetical case does not imply that environmental measures will under no circumstances require compensation for the foreign owner. But it has made clear that only exceptional circumstances would call for compensation; for example, if the host country would drastically change its environmental policy in a completely unpredictable manner and thereby economically force out of business a foreign owner who has recently made larger investments. Although without such extreme conditions, the foreigner will have to accept environmental measures in the same manner as the citizens of the host state. □

Bolivian Puma Fights Crime

An international drug ring was recently uncovered with the help of the Washington Convention on trade in Endangered Species (1973) and a Bolivian puma. On March 29 a caged puma was flown into Hamburg, Germany, from Bolivia. Because the puma is a protected species under the terms of the Washington Convention, German customs officials took possession both of the animal and its transport cage. After removing the puma from the cage, a false cage bottom was discovered which, upon being opened, revealed a substantial quantity of cocaine. The puma's intended recipient, who disclosed the existence of the international drug ring, now enjoys a stationary cage of his own.

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Photo: L. Bianco

A Special Working Session of the Parties for the Convention on International Trade in Endangered Species of Wild Fauna and Flora was held in Geneva from 17 - 28 October. The meeting was organised by the International Union for the Conservation of Nature and Natural Resources (IUCN) on behalf of the United Nations Environment Programme (UNEP).

The general aim of the working session was to prepare the way for practical implementation of the Convention by preparing recommendations for the Conference of Parties which will probably be held next year. Briefly, the objectives of the Special Working Session were to discuss guidelines for shipment of living specimens, the possibility of having internationally agreed manuals for the identification of specimens and to study procedures for the exchange of museum specimens. Participants also examined the need to set up an information system to help place confiscated live animals in rescue centres.

States participating in the working session were excluding parties to the Convention eight others, namely, Argentina, France, Italy, Gabon, Mexico, Netherlands, Philippines and Uganda.